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No. 81-2120

In the

Supreme Court of the United States

October Term, 1981

Durham Industries, Inc.,

Petitioner,

—against—

The North River Insurance Company,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The Questions Presented

1. Can the obligor of a surety bond fraudulently misuse the procedures of the United States Court system, to delay payment of a justified claim without incurring civil tort liability to the party wronged?

2. Is perjury, in answers to interrogatories, which is part of a scheme to delay payment of a justified claim under a surety bond, conduct of such a degree of moral turpitude and of such wanton dishonesty as to imply a criminal indifference to civil obligations and thereby form the basis of an award of punitive damages?

3. Was there sufficient evidence to support the jury's verdict in favor of the petitioner, awarding compensatory damages based upon prima facie tort, resulting from the respondent's misuse of Federal Court procedures?

4. Were the fraudulent actions of the respondent insurance company, sufficient to constitute such a bad faith breach of its surety bond; as would provide the basis for the imposition of punitive damages?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. .....

DURHAM INDUSTRIES, INC.,

Petitioner,

—against—

THE NORTH RIVER INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Second Circuit entered on the 25th day of February, 1982.

The opinion of the United States Court of Appeals is printed in Appendix "A" hereto and is not yet officially reported.

Jurisdiction

This is an action brought to recover both compensatory and punitive damages against the respondent insurance company, arising out of the respondent's improper and fraudulent misuse of the process of the United States District Court for the Southern District of New York, in order to delay payment of the petitioner's justified claim under a surety bond, while it attempted to recover its collateral, which it had negligently allowed to lapse; from a person

other than the petitioner. The petitioner alleges that the respondent was able, by the use of false allegations of fact in its answer to the Complaint and perjury in answers to interrogatories to continue to assert a spurious defense, in the United States District Court for the Southern District of New York, for a period of two (2) years. This delay required the petitioner to borrow money in the open market to replace the amount of its justified claim which had not been paid by the respondent, thereby causing the compensatory damages alleged herein.

Statement

The circumstances leading up to this case arose out of the issuance of a Bill of Lading, covering a shipment of toys from Japan to Philadelphia, by the Ta Peng Steamship Company to Durham Industries, Inc. When the shipment covered by the Bill of Lading failed to arrive on the designated ship, Durham commenced an action against Ta Pen seeking recovery of the amount paid to the shipper under its letter of credit in Japan. This action was assigned to Judge Charles E. Stewart, Jr., in the United States District Court, Southern District of New York (Index No. 73 Civ. 4740).

Durham obtained an attachment of a bank account of the steamship company, containing approximately $300,000.00. The steamship company then purchased a Surety Bond, which supported the issuance of an Order discharging the attachment of its bank account. The Surety Bond was issued by the respondent herein, North River Insurance Co., and guaranteed payment of any judgment which might be recovered against Ta Peng. The insurance company received a letter of credit in the amount of $300,000.00, from Ta Peng which was to act as collateral for the issuance of the Surety Bond, and was drawn on

Franklin National Bank and replaced by a letter of credit in the same amount drawn on the First National City Bank. The letter of credit had a life of one (1) year and was renewed by the steamship company for one (1) year. The North River Insurance Company allowed the letter of credit to expire after its second year without taking any steps to obtain its renewal or to make any withdrawal thereunder. Ten (10) days after the expiration of the above letter of credit on April 18, 1976, the prior action came on for trial before Judge Stewart. After trial, Judge Stewart entered judgment, in the amount of $223,670.08, in favor of the plaintiff, Durham, against the defendant in the former action, Ta Peng. Ta Peng did not pay the said judgment. The bond issued by North River Insurance Company contained an obligation that North River Insurance Company would pay to the plaintiff in the former action, Durham Industries, Inc., the amount of any judgment which might be recovered in that action against Ta Peng Steamship Co., Ltd. Durham then turned to North River Insurance Company for payment. Upon refusal of the insurance company to make payment of the judgment which had been recovered against Ta Peng Steamship Co., Ltd., an action was commenced by Durham Industries, Inc., against North River Insurance Company seeking recovery under the terms of the Surety Bond. This action was commenced on June 13, 1976, in the United States District Court, for the Southern District of New York and bore Index No. 76 Civ. 2433 (Judge Lasker). The North River Insurance Company interposed an answer to the complaint, including the affirmative defense of fraud and collusion between Durham and Ta Peng, which it alleged, released it from its obligation under the terms of the bond.

On or about June 13, 1976, North River Insurance Company commenced its own action against Ta Peng Steam-

ship Co., in the New York Supreme Court, seeking to compel Ta Peng to reinstate the collateral for the bond. On August 25, 1976, this action between North River Insurance Company and Ta Peng Steamship Co., Ltd., was settled in accordance with a written confession of judgment in which Ta Peng Steamship Co., Ltd., agreed to make twelve (12) monthly payments of $20,000.00 each, to North River Insurance Company. The North River Insurance Company received three (3) such payments.

The North River Insurance Company, in order to hide this settlement and its receipt of the above funds under the settlement of its action against Ta Peng Steamship Co., Ltd., then proceeded to give false answers to the plaintiff's interrogatories under oath.

The petitioner contends that the affirmative defense of fraud interposed by the respondent, North River Insurance Company contained several patent falsehoods, which were asserted as statements of fact, with the sole intention of misleading Judge Lasker into thinking that there was some factual basis for the affirmative defense of fraud. As a result of this assertion, defendant was able to continue this defense for two (2) years in an attempt to delay paying the plaintiff's justified claim, until such time as it had recouped its collateral.

All of the judges who have examined the record in this case agree that the respondent insurance company misused the process of the United States District Court in order to delay the day upon which it would be required to pay the petitioner's justified claim, until it had an opportunity to recover its lapsed collateral. Judge Sweet in the United States District Court, for the Southern District of New York, the Trial Judge in this case, on March 25, 1981, made the following statement on the record:

"I have spent some time also considering if there is any other theory upon which Punitive Damages might be appropriate, and it has occurred to me that under the evidence submitted, it may well be that there was a fraud on the Court committed by virtue of the false answers to interrogatories. The difficulty I have with that theory is that even if that be so, I don't see how that fraud is the cause of any special damages. It seems to me that those answers, the fraudulent answers, that is, that there had been no communications between Ta Peng and North River when in fact there had been such communications, I don't see that those answers, the falsity of those answers, were the cause of any injury to the Plaintiff. Therefore, even if the pleadings were amended again to conform to the proof to state a claim of fraud on the Court, I don't see any causation which would arrive at any special damages which in turn could give rise to Punitive Damages."

On March 26, 1981, Judge Sweet again referred to this matter on the record, in the following language:

"With respect to the case which you have cited to me, the Court of Appeals case, Doralee Estates against City Service, the underlying violation there committed by the Defendant upon which the Punitive Damages were granted, was a violation of the prior Stipulation, and I suppose as I understand it, we are in a somewhat anomalous position where you can get Punitive Damages on any cause in New York, providing you meet the requirements to show malice, etc., except perhaps Prima Facie Tort, but that is my understanding of the law.

This gives me particular trouble in this case for the simple reason that I think the conduct of the insur-

ance company in this matter was indeed outrageous. There is no question about it. I indicated on the record yesterday, if I could figure out a way to deal with fraud on the Court, I certainly would do it, but I can't, and I am a little bit frustrated by the state of the New York law."

The dissenting opinion in the United States Court of Appeals for the Second Circuit in this case, considered this matter in the following language:

"The jury was entitled to find that North River delayed, by the assertion of its unfounded affirmative defense of fraud, the payment of its legal obligation to Durham. As an excuse for this behavior, North River asserts that it desired to attempt to recover the $223,670.08 from a third party before it paid that amount to Durham. This surely is not a proper justification for North River's action. Conduct such as this results in no gain to the public whatsoever. Indeed, the public is the victim of such shoddy and dishonest business dealings.

If conduct such as that by North River is to be considered proper, then some shrewd persons may attempt to avoid timely payment of their debts, ostensibly while waiting to collect their accounts receivable. If the stakes are high enough, they may even be willing to defend a lawsuit to delay payment, knowing that what they can earn on the money at market rates will more than cover their attorney's fees and the artificially low legal rate of interest they will eventually have to pay on the judgment entered against them. Under the rationale of today's majority's opinion, they will be able to engage in such dishonest behavior, secure in the knowledge that they

will prevail should their creditors sue them upon a claim of prima facie tort.

In short, in my view Durham clearly has established all the elements of a case of prima facie tort. It sustained obvious injury—the loss of the use of $223,670.08—as a result of North River's deliberate action in asserting the unfounded fraud defense. The assertion of this defense, ordinarily a lawful action, was rendered tortious by North River's lack of any legitimate, legally cognizable excuse for asserting it. New York law provides Durham with a remedy for such injury."

The majority opinion in the Court of Appeals, in essence, agreed with the above evaluation of the insurance company's conduct in the following language:

"The most the jury permissibly could infer from the proof was that North River asserted the affirmative defense of fraud in order to postpone the day it would have to make good on its bond, without any expectation of prevailing on the merits of the defense. The jury might have concluded that North River falsely answered plaintiff's interrogatories to conceal the existence of its lawsuit against Ta Peng, but such concealment resulted from the same motivation. The evidence established beyond peradventure that North River acted purely out of self-interest to mitigate or avoid a business loss. It was insufficient to support liability on a theory of prima facie tort."

The majority opinion in the United States District Court absolves the respondent insurance company from liability for damages, despite its improper conduct herein, because it was seeking to recapture collateral which it had negligently allowed to lapse.

It is respectfully submitted, that the majority opinion in the United States Court of Appeals for the Second Circuit, is in direct contradiction to the law of the State of New York, as set forth in the case of *Gordon* v. *Nationwide Mutual Insurance Co.*, 30 N.Y.2d 427, 437 (1972), cert. denied, 410 U.S. 931 (1973); and *Walker* v. *Sheldon*, 10 N.Y.2d 401, 405 (1961); *Borkowski* v. *Borkowski*, 39 N.Y.2d 982 (1976).

Reasons for Granting the Writ

This petition raises substantial and important questions concerning the power of the United States Courts to award damages, both compensatory and punitive, to an innocent party who has been injured by the fraudulent misuse of its process. It is an ancient maxim that the law abhors damage without remedy. Furthermore, there is a conflict between the law as set forth in the decisions of the New York State Court of Appeals and the majority opinion of the United States Court of Appeals for the Second Circuit, which requires reconciliation by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. Nos. 201, 271—August Term, 1981

(Argued: October 2, 1981 Decided: February 25, 1982)

Docket Nos. 81-7305, 81-7395

DURHAM INDUSTRIES, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

THE NORTH RIVER INSURANCE COMPANY,

Defendant-Appellant-Cross-Appellee.

Before:

MOORE, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York following a jury trial before Judge Robert W. Sweet and from certain trial and post-trial orders of the district court.

Judgment reversed with directions to dismiss complaint.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

PHILIP SCHLAU, New York, N. Y. (Newman & Schlau, P.C., and John W. Manning, New York, N. Y., on the brief), *for Defendant-Appellant-Cross-Appellee.*

LAWRENCE LAUER, New York, N. Y., *for Plaintiff-Appellee-Cross-Appellant.*

VAN GRAAFEILAND, *Circuit Judge:*

The North River Insurance Company appeals from a $32,558.21 judgment of the United States District Court for the Southern District of New York, which followed a jury award of damages in prima facie tort to Durham Industries, Inc., and from Judge Sweet's denial of North River's motion for judgment n.o.v. Durham cross-appeals from Judge Sweet's orders which dismissed Durham's cause of action for punitive damages and denied Durham's motion for a new trial on the issue of punitive damages. Because there was insufficient evidence of a prima facie tort to support the jury verdict and Durham has no actionable claim for punitive damages under New York law, we reverse the judgment and remand to the district court with instructions to dismiss the complaint.

In 1974, Durham commenced an action in the Southern District of New York against Ta Peng Steamship Company, Ltd., a Taiwanese corporation, to recover damages for the non-delivery of goods for which Ta Peng had issued a bill of lading. Durham attached a bank account belonging to Ta Peng containing approximately $300,000, and North River issued a bond or undertaking supporting the discharge of this attachment. As collateral for the undertaking, Ta Peng gave North River an irrevocable

letter of credit issued by Franklin National Bank in the amount of $350,000. Subsequently, this was replaced by a new letter of credit drawn on First National Citibank, which, through oversight, North River permitted to expire on April 18, 1976.

On April 28, 1976, Durham obtained a judgment against Ta Peng in the amount of $223,670.08. When Ta Peng failed to pay the judgment, Durham looked to North River for payment pursuant to the undertaking. However, North River also refused to pay. Durham then sued North River on the bond in the Southern District, and North River sued Ta Peng in State court for indemnity. North River interposed an answer to Durham's complaint, raising, upon information and belief, the affirmative defense of fraud. North River alleged that Durham and Ta Peng conspired to extend Durham's action against Ta Peng beyond April 18, 1976 without notice to North River, thereby depriving North River of its collateral. When Durham's case finally was reached for trial, North River's defense of fraud was found to be without merit, and, on November 16, 1978, judgment was entered against North River in the amount of $223,670.08 plus interest at 6% from April 28, 1976. North River paid the judgment but shortly thereafter Durham commenced the instant action alleging prima facie tort and abuse of process.

In support of its claim of prima facie tort, Durham introduced a series of letters and memoranda from North River's file, which reflected a continuing effort on the part of North River to obtain renewed collateral or payment from Ta Peng before paying Durham. For example, on July 14, 1976, William Windrow, an Assistant Vice-President of North River, sent an inter-office memorandum to

J. J. Myers, Senior Vice-President, pertaining to possible settlement with Ta Peng. That same day, Windrow wrote reinsurers on the undertaking informing them of the proposed settlement and stating with regard to Durham's law suit, "[w]e are defending that action but are not at all confident as to the success of our defenses."

On July 16, 1976, Durham moved for an order dismissing the affirmative defense of fraud and for summary judgment. North River opposed on the ground it had raised material issues of fact which could not be resolved without discovery. The district court agreed and, on November 4, 1976, denied Durham's motion.

In the meantime, North River settled its action against Ta Peng. The Steamship Company agreed to make twelve monthly payments of $20,000 to North River and, on August 25, 1976, signed a confession of judgment to be entered in the event of a default. On September 23, 1976, Windrow was informed by counsel that Ta Peng had paid its first installment of $20,000. Counsel also stated that Durham's summary judgment motion was pending and that "the main thrust of our opposition is to request Judge Lasker to deny Summary Judgment and permit us to conduct preliminary proceedings, including depositions, discovery and inspection."

On November 3, 1976, Windrow wrote the reinsurance companies that Ta Peng had paid two installments and that North River was "hopeful that we will receive full collateral prior to our being called upon to pay the outstanding judgment." In fact, Ta Peng made only three payments totaling $60,000 before defaulting. Following the default, judgment was entered against Ta Peng.

North River did not advise Durham or the court that it had brought an action against Ta Peng or that the action

had been settled in North River's favor. On November 15, 1976, Durham served interrogatories. Interrogatory No. 47 asked whether North River had had any communication with Ta Peng after April 18, 1976. On January 3, 1977, North River answered in the negative. Interrogatories No. 37 and 50 asked North River to state whether it had any security or property which would serve to indemnify it and, if so, to state when and from whom it was received. North River did not answer either interrogatory on January 3. It did state, however, that it had attempted unsuccessfully to attach property owned by Ta Peng. It was not until March 11, 1977, that North River answered interrogatory No. 37, revealing that it had received $60,000 from Ta Peng.

Durham commenced the instant action against North River in April 1979, seeking special and punitive damages for abuse of process and prima facie tort. The complaint was amended at trial to allege a cause of action for bad faith by an insurer in discharging its obligations. The district court dismissed the causes of action for bad faith and abuse of process and the demand for punitive damages, but submitted to the jury the claim of prima facie tort. The jury returned a verdict against North River in the amount of $32,558.21, which, quite obviously, was based on the difference between the statutory 6% interest incorporated in the judgment and the cost to Durham of borrowing $223,670.08 during North River's delinquency.

The introduction into American jurisprudence of the doctrine of prima facie tort is credited generally to Justice Holmes. *See ATI, Inc.* v. *Ruder & Finn, Inc.*, 42 N.Y.2d 454, 458 (1977). As construed by Justice Holmes in the seminal case of *Aikens* v. *Wisconsin*, 195 U.S. 194 (1904), the doctrine is based upon the doing of a harm maliciously or malevolently "for the sake of the harm as an end in

itself, and not merely as a means to some further end legitimately desired." *Id.* at 203. *See also American Bank & Trust Co.* v. *Federal Reserve Bank*, 256 U.S. 350, 358 (1921).

The concept was first recognized in New York in *Beardsley* v. *Kilmar*, 236 N.Y. 80 (1923). Following the lead of Justice Holmes, the New York Court of Appeals held that liability in tort could attach to the performance of otherwise lawful conduct but that "the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another." *Id.* at 89-90. Since *Beardsley*, New York courts have emphasized reepatedly that malice is an essential element of prima facie tort and that a claim of prima facie tort does not lie where the defendant has any motive other than a desire to injure the plaintiff. *See, e.g., RKO-Stanley Warner Theatres, Inc.* v. *Century Circuit, Inc.*, 37 A.D.2d 828, 829 (1971); *Squire Records, Inc.* v. *Vanguard Recording Society, Inc.*, 25 A.D.2d 190, 191-92 (1966); *Benton* v. *Kennedy-Van Saun Mfg. & Eng. Corp.*, 2 A.D. 2d 27, 29 (1956); *Korry* v. *International Telephone & Telegraph Corp.*, 444 F. Supp. 193, 195 (S.D.N.Y. 1978).

> [R]ecovery has been limited to those instances where the sole motivation for the damaging acts has been a malicious intention to injure the plaintiff. Where there are other motives, *e.g.*, profit, self-interest, business advantages, there is no recovery under tort prima facie. *Squire Records, Inc.* v. *Vanguard Recording Society, Inc., supra*, 25 A.D.2d at 191-92.

In considering North River's contention that the evidence was insufficient to support the jury verdict, we must deter-

mine whether "there can be but one reasonable conclusion as to the proper judgment." 5A Moore's Federal Practice ¶ 50.07[2] (2d ed. 1981). If, after viewing all the evidence most favorably to plaintiff, we cannot say that the jury could reasonably have returned the verdict in its favor, our duty is to reverse. *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, No. 81-7090. slip op. at 80 (2d Cir. Oct. 16, 1981). The district court instructed the jury, correctly and without exception, that for the liability of prima facie tort to attach, "the intent to injure or harm the plaintiff must have been the sole motive of the defendant." Viewed in the light most favorable to the plaintiff, the evidence does not support an affirmative jury finding on this issue.

The most the jury permissibly could infer from the proof was that the North River asserted the affirmative defense of fraud in order to postpone the day it would have to make good on its bond, without any expectation of prevailing on the merits of the defense. The jury might have concluded that North River falsely answered plaintiff's interrogatories to conceal the existence of its lawsuit against Ta Peng, but such concealment resulted from the same motivation. The evidence established beyond peradventure that North River acted purely out of self-interest to mitigate or avoid a business loss. It was insufficient to support liability on a theory of prima facie tort.[1]

We find no merit under New York law in Durham's contention that the district court should have submitted to

[1] Except as the elements of Durham's abuse of process claim relate to its cause of action for prima facie tort, Durham does not contend that the district court's dismissal of that claim was error. The district court found no causal relation between the breach, if any, of the duties which North River's counsel owed to the court and the damages which Durham allegedly sustained.

the jury Durham's claim for punitive damages based on a "tort of bad faith". As the beneficiary of North River's undertaking, Durham had an enforceable contract right against North River. *Daniel-Morris Co., Inc.* v. *Glenns Falls Indemnity Co.*, 308 N.Y. 464, 468-69 (1955); *Area Masonry, Ltd.* v. *Dormitory Authority*, 64 A.D.2d 810 (1978); *see* Fed. R. Civ. P. 65.1 Durham was entitled to rely not only upon the express provisions of the undertaking, but also upon the implied covenant of good faith and fair dealing that exists in every contract. *See Gordon* v. *Nationwide Mutual Insurance Co.*, 30 N.Y.2d 427, 437 (1972), *cert. denied*, 410 U.S. 931 (1973). However, under New York law, punitive damages may not be awarded in breach of contract cases, which involve a private wrong and where no public rights are involved. *Garrity* v. *Lyle Stuart, Inc.*, 40 N.Y.2d 354, 358 (1976). There must be fraud "aimed at the public generally", evincing a "high degree of moral turpitude", and demonstrating "such wanton dishonesty as to imply a criminal indifference to civil obligations". *Walker* v. *Sheldon*, 10 N.Y.2d 401, 405 (1961). *See Sanfilippo* v. *Metropolitan Life Insurance Co.*, 74 A.D.2d 600 (1980); *Hubbell* v. *Trans World Life Insurance Co.*, 70 A.D.2d 949 (1979); *Thaler* v. *North River Insurance Co.*, 63 A.D.2d 921 (1978); *John C. Supermarket, Inc.* v. *New York Property Insurance Underwriting Ass'n*, 60 A.D. 2d 807 (1978); *M.S.R. Associates Ltd.* v. *Consolidated Mutual Insurance Co.*, 58 A.D.2d 858 (1977); *Buttignol Construction Co.* v. *Allstate Insurance Co.*, 22 A.D.2d 689 (1964), *aff'd*, 17 N.Y.2d 476 (1965).[1] There was no such fraud in the case at bar.

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[1] *Greenspan* v. *Commercial Insurance Co.*, 57 A.D.2d 387 (1977), relied upon by counsel for Durham, deals only with the sufficiency of a complaint. So far as *Greenspan* conflicts with the cited cases herein, it does not represent the prevailing New York view.

Appendix A—Opinion of the United States Court of Appeals for the Second Circuit

In directing that the complaint be dismissed, we do not condone the conduct of the North River Insurance Company which the trial court found to be improper. However, the New York Superintendent of Insurance has adequate authority to take disciplinary action if he finds it to be appropriate under the circumstances. *See* N.Y. Ins. Law § 40-d (McKinney Supp. 1981-1982).

The judgment in favor of Durham is reversed, and the matter is remanded to the district court with instructions to dismiss the complaint. No costs to either party.

TIMBERS, *Circuit Judge*, concurring in part and dissenting in part.

I concur in the majority's dismissal of Durham's cross-appeal, since I agree that under New York law Durham has no cause of action against North River for either bad faith breach of contract or punitive damages.

With respect to the majority's reversal of the judgment, Robert W. Sweet, *District Judge*, entered upon a jury verdict in favor of Durham awarding damages based on prima facie tort, however, I believe that the majority has misread New York law regarding prima facie tort. From this part of the majority opinion, I therefore respectfully dissent.

Under New York law, four elements must be shown to establish a case of prima facie tort. They are: "[1] the infliction of intentional harm, [2] resulting in damage, [3] without excuse or justification, [4] by an act or a series of acts which would otherwise be lawful." *ATI, Inc.* v. *Ruder & Finn, Inc.*, 42 N.Y.2d 454, 458, 368 N.E.2d 1230, 398 N.Y.S.2d 864, 866 (1977), quoting *Ruza* v. *Ruza*, 286 A.D. 767, 769, 146 N.Y.S.2d 808, 811 (1st Dept. 1955). I agree with the majority that Durham has proven the first, second,

and fourth elements, I disagree with the majority's holding that Durham has not established the third element.

The majority states that "New York courts have emphasized repeatedly that . . . a claim of prima facie tort does not lie where the defendant has any motive other than a desire to injure the plaintiff." I recognize that the cases cited by the majority stand for that proposition. The majority's list of cases, however, is conspicuous for the absence of any decision by the New York Court of Appeals. The "sole motivation" test appears to be followed only by the New York Appellate Division courts and by the federal district courts. It does not appear to be an accurate statement of the law of New York as enunciated by the New York Court of Appeals.

It seems to me that the proper test under New York law is not whether malice was the sole motive for the intentional harm, but whether the defendant has any other legitimate, legally cognizable motive for his action.[1] As the New York Court of Appeals stated in *ATI, supra:*

> "Of course, one can always advance an explanation for one's conduct but, in this type of case, it must be an excuse or justification which the law will recognize. . . . Underlying the question of excuse or justification, it has been noted, is the question of whether the public's gain outweighs the harm to another." 42 N.Y.2d at 459, 368 N.E.2d at 1233, 398 N.Y.S.2d at 867.

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[1] The majority quotes Justice Holmes' classic formulation of the doctrine of prima facie tort. That formulation is that the tort will not lie where the harm was committed "as a means to some further end *legitimately* desired." *Aikens* v. *Wisconsin*, 195 U.S. 194, 203 (1904) (emphasis added).

Accord, Opera on Tour, Inc. v. *Weber*, 285 N.Y. 348, 34 N.E.2d 349 (1941); *Burns Jackson Miller Summit & Spitzer* v. *Lindner*, 108 Misc.2d 458, 437 N.Y.S.2d 895, 902 (Sup. Ct., Queens Co., 1981).

Thus, the correct approach to the problem here presented, I suggest, is to examine whether North River's non-malicious motives were legitimate, legally cognizable ones —whether they would result in gain to the public which outweighed the harm to Durham. The record before us strongly indicates that they were not of that character. The jury was entitled to find that North River delayed, by the assertion of its unfounded affirmative defense of fraud, the payment of its legal obligation to Durham.[2] As an excuse for this behavior, North River asserts that it desired to attempt to recover the $223,670.08 from a third party before it paid that amount to Durham. This surely is not a proper justification for North River's action. Conduct such as this results in no gain to the public whatsoever. Indeed, the public is the victim of such shoddy and dishonest business dealings.

If conduct such as that by North River is to be considered proper, then some shrewd persons may attempt to avoid timely payment of their debts, ostensibly while waiting to collect their accounts receivable. If the stakes are high enough, they may even be willing to defend a lawsuit to delay payment, knowing that what they can earn on the money at market rates will more than cover their attorney's fees and the artificially low legal rate of interest they will eventually have to pay on the judgment entered against

[2] The jury moreover, very well could have found that North River lied in its answers to interrogatories as part of its effort to delay payment.

them. Under the rationale of today's majority's opinion, they will be able to engage in such dishonest behavior, secure in the knowledge that they will prevail should their creditors sue them upon a claim of prima facie tort.

In short, in my view Durham clearly has established all the elements of a case of prima facie tort. It sustained obvious injury—the loss of the use of $223,670.08—as a result of North River's deliberate action in asserting the unfounded fraud defense. The assertion of this defense, ordinarily a lawful action, was rendered tortious by North River's lack of any legitimate, legally cognizable excuse for asserting it. New York law provides Durham with a remedy for such injury.

From the majority's refusal to recognize that remedy by reversing the judgment entered on the jury verdict in favor of Durham, I respectfully dissent.

APPENDIX B

Order of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 81-7305, 81-7395

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of February, one thousand nine hundred and eighty-two.

Present:

HON. LEONARD P. MOORE,
HON. WILLIAM H. TIMBERS,
HON. ELLSWORTH A. VAN GRAAFEILAND,
Circuit Judges.

DURHAM INDUSTRIES, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

THE NORTH RIVER INSURANCE COMPANY,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Order of the United States Court of Appeals for the Second Circuit

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment in favor of Durham Industries, Inc., by said district court is reversed and the action be and it hereby is remanded, without costs, to said district court with instructions to dismiss the complaint in accordance with the opinion of this court.

A. Daniel Fusaro, Clerk
/s/ Arthur Heller
by Arthur Heller,
Deputy Clerk

Office - Supreme Court, U.S.
FILED
JUN 14 1982
ALEXANDER L. STEVAS,
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No. 81-2120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DURHAM INDUSTRIES, INC.,

Petitioner,

—against—

THE NORTH RIVER INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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THE QUESTIONS PRESENTED

1. Is there a sufficient predicate for the grant of a writ of certiorari in this diversity case?

2. Did the Court of Appeals properly determine and apply state law?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

JURISDICTION

The Judgment of the Court of Appeals was entered on February 25, 1982, and the Petition for a Writ of Certiorari was filed within 90 days of that date. Petitioner apparently invokes the jurisdiction of this Court to review the decision of the Court of Appeals by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

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* A list of the parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of The North River Insurance Company is set forth in Appendix "A" hereto.

STATEMENT OF THE CASE

Petitioner, DURHAM INDUSTRIES, INC., presents this case as one involving claims for fraud, perjury, and "misuse" of process. In actuality, the complaint in this diversity action set forth two counts: one for abuse of process, and the second for prima facie tort. The complaint also included a claim for punitive damages.

The action arose from the interposition of an affirmative defense by the respondent, THE NORTH RIVER INSURANCE COMPANY, in a prior action between these same two parties in the United States District Court for the Southern District of New York. The petitioner alleges that there was no basis for the affirmative defense and that it was interposed for purposes of delaying payment to petitioner until respondent had recouped certain collateral. Jurisdiction in both the prior action and in the case at bar was predicated upon diversity of citizenship, and the Courts properly applied the law of the State of New York.

The claim for abuse of process was dismissed as a result of certain pre-trial motions. At trial, DURHAM's motion to amend its complaint so as to allege a breach of contract was granted, but this count was dismissed at the close of DURHAM's case as was the claim for punitive damages. The issue of prima facie tort was submitted to the jury which returned a verdict in favor of the plaintiff for the full amount of compensatory damages claimed.

Respondent, THE NORTH RIVER INSURANCE COMPANY, appealed from the judgment entered upon the jury verdict finding it liable for prima facie tort. Petitioner DURHAM INDUSTRIES, INC. cross-appealed from the orders of the Court dismissing the claim for breach of contract and the claim for punitive damages.

The Court of Appeals for the Second Circuit reversed the judgment in favor of DURHAM, and remanded the action to

the District Court with instructions to dismiss the complaint. In doing so, the Court of Appeals reviewed the development of the doctrine of prima facie tort in New York, and concluded that the evidence adduced, viewed in the light most favorable to the plaintiff, DURHAM, was insufficient to support a finding of liability on a theory of prima facie tort. The Court of Appeals also found no merit under New York law in DURHAM's contention that its claim for punitive damages should have been submitted to the jury.

ARGUMENT

I.

The Petition lacks a basis for the grant of a Writ of Certiorari

Rule 17 of the Supreme Court Rules sets forth the character of reasons that will be considered by this Court in the exercise of its discretion to grant review on certiorari. Conspicuous by its absence is the reason presented by this petition, to wit, a purported conflict between a decision of the court of appeals and applicable state law.

Where an issue involves the determination and application of local law, normally the federal appellate courts are the final arbiters of state law for the federal courts within their circuit, and the Supreme Court will not review the considered determination of questions of state law by the federal courts of appeals, other than in exceptional circumstances. *Huddleston v. Dwyer,* 322 U.S. 232 (1944). Nor should the Supreme Court overturn a decision of the court of appeals unless the appellate court's determination of an important local law is clearly incorrect. Frankfurter and Hart, *The Business of the Supreme Court at October Term, 1933,* 48 Harvard Law Review 238, 269-270 (1934). The conflict between the decision of the court of appeals and applicable state law should be clear, not merely hypothetical or conjectural. 13 Moore's Federal Practice, ¶ 817.25-1[3].

Great weight should be accorded to the determination of local law made by the court of appeals, and a conflict between a decision of the court of appeals and applicable state law should not motivate the grant of certiorari unless the circumstances of the case are peculiar or the conflict particularly egregious. 13 Moore's Federal Practice ¶ 817.25-1[3]. Such is not the fact in the case at bar.

II.

The Court of Appeals properly applied well established principles of New York law in ruling that there was insufficient evidence of prima facie tort and no actionable claim for punitive damages.

Petitioner persists in asserting that the law of the State of New York is other than as stated by the United States Court of Appeals for the Second Circuit. However, petitioner fails to offer any authority to demonstrate that the Court of Appeals misapplied or wrongly interpreted the law of New York governing prima facie tort and punitive damages.

The law of New York is clear: malice, unmixed with any other motive, is an essential element of prima facie tort. *Beardsley v. Kilmer,* 236 N.Y. 80 (1923). It requires the infliction of intentional harm resulting in damage. *ATI, Inc. v. Ruder & Finn, Inc.,* 42 N.Y.2d 454 (1977); *Smith v. Fidelity Mutual Life Insurance, Co.,* 444 F. Supp. 594 (S.D.N.Y., 1978). The intention to harm, as distinguished from the intention merely to commit the act, must be present, must motivate the action and cause the injury to the plaintiff. *Ruza v. Ruza,* 286 App. Div. 767 (1955).

It is well-settled in New York that a claim of prima facie tort does not lie where the defendant's action has any motive other than a desire to injure the plaintiff. *RKO-Stanley Warner Theatres, Inc. v. Century Circuit, Inc.,* 37 A.D.2d 828 (1971); *Squire Records, Inc. v. Vanguard Recording Society, Inc.,* 25 A.D.2d 190 (1966); *Benton v. Kennedy-Van Saun Mfg. & Eng.*

Corp., 2 A.D.2d 27 (1956). The specific intent must be to do harm to the plaintiff, and that must also be the exclusive motive. *Korry v. International Telephone and Telegraph Corp.*, 444 F. Supp. 193 (S.D.N.Y. 1978). If a defendant acts from mixed motives, one of which is the furtherance of his own business interests, that is not enough. *Squire Records, Inc. v. Vanguard Recording Society, Inc., supra; Glenn v. Advertising Publications, Inc.*, 251 F. Supp. 889 (S.D.N.Y., 1966).

The Court of Appeals correctly applied the law of New York to the facts of this case. The Court of Appeals found that the evidence, viewed in the light most favorable to the plaintiff, may support a finding that THE NORTH RIVER INSURANCE COMPANY asserted the affirmative defense in order to postpone payment on its bond. However, such evidence established beyond doubt that THE NORTH RIVER INSURANCE COMPANY acted soley to advance its own business interests by seeking to mitigate or avoid a business loss. Indeed, petitioner's own pleadings and contentions support this finding inasmuch as petitioner has consistently avowed that respondent, THE NORTH RIVER INSURANCE COMPANY, asserted the affirmative defense in order to delay payment until such time as it recouped its collateral. Clearly, by petitioner's own averments, respondent sought to further its own interest, not to do harm to petitioner. The Court of Appeals correctly concluded that NORTH RIVER acted purely out of self-interest to mitigate or avoid a business loss. Under the law of New York, such a finding precludes liability on a theory of prima facie tort.

Petitioner's claim for punitive damages in this diversity case is also governed by the law of the State of New York. *Givens v. W.T. Grant Co.*, 457 F.2d 612 (2d Cir.), vacated on other grounds, 409 U.S. 56, modified 472 F.2d 1039 (2d Cir., 1972). The Court of Appeals correctly applied the well-settled law of New York that punitive damages are not recoverable for a mere breach of contract, for in such case, only a private wrong, not a public right is involved. *Sanfilippo v. Metropolitan Life Insurance Co.*, 74 A.D.2d 600 (1980). In such a case, the plaintiff must demonstrate, in support of its claim for punitive

damages, that defendant as an insurer had engaged in fraudulent, criminal or dishonest acts or practices affecting the general public and not merely in an isolated transaction incident to an otherwise legitimate business, or that in its dealings with the general public, defendant had engaged in a fraudulent scheme evincing such a high degree of moral turpitude and such wanton dishonesty as to imply a criminal indifference to civil obligations. *Hubbell v. Trans World Life Insurance Co.*, 70 A.D.2d 949 (1979), affirmed 50 N.Y.2d 899 (1980); *Thaler v. North River Insurance Co.*, 63 A.D.2d 921 (1978); *John C. Supermarket, Inc. v. New York Property Insurance Underwriting Association*, 60 A.D.2d 807 (1978). No such showing was made upon the trial of this action.

Furthermore, it is clear that under the law of New York a claim for punitive damages cannot stand alone but must be predicated upon some underlying cause of action. *M.S.R. Associates. Ltd. v. Consolidated Mutual Insurance Co.*, 58 A.D.2d 858 (1977). It is equally clear that New York does not allow punitive damages for prima facie tort. *Brandt v. Winchell*, 3 N.Y.2d 628 (1958); *Sheppard v. Coopers' Inc.*, 13 Misc. 2d 862, aff'd. 3 A.D.2d 909 (1957); *Winderbaum v. Winderbaum*, 39 Misc.2d 478 (1963). Under the law of New York, only actual damages may be recovered for prima facie tort. *Bohm v. Holzberg*, 47 A.D.2d 764 (1975); *Walsh Brothers, Inc. v. Jacob Ruppert*, 7 A.D.2d 896 (1959). Thus, it is clear that both the Court of Appeals and the trial court correctly determined and applied the law of New York to the issue of punitive damages, and properly dismissed petitioner's claim.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

List of parent companies, subsidiaries
(except wholly owned subsidiaries) and
affiliates of THE NORTH RIVER INSURANCE COMPANY

Parent:

Crum & Foster Corporation

Subsidiary:

Constitution Reinsurance Corporation

Affiliates:

International Insurance Company
United States Fire Insurance Company
C & F Credit Corporation
C & F Credit Corp. of California
Crum & Foster Insurance Company (Bermuda)
Ltd. (formerly St. John's Insurance Co., Ltd.)
Crum & Foster Managers (Bermuda) Ltd.
J.H. Blades & Co., (International) Ltd.
Blades, Driver & Co. Ltd.
Westchester Fire Insurance Company
Industrial Indemnity Company
International Surplus Lines Insurance Company
Crum & Foster Managers Corporation
Richard Whiley, Inc.
Industrial Underwriters Insurance Company
Industrial Insurance Company
Industrial Insurance Company of Hawaii, Ltd.
Industrial Indemnity Company of Alaska
Industrial Indemnity Company of the Northwest
Industrial Indemnity Life Insurance Company
California Insurance Company
Constitution Reassurance S.A.
London Agency, Inc.
Floyd West & Company

L.W. Biegler Inc.
L.W. Biegler Inc. (N.J.)
L.W. Biegler Inc. (N.Y.)
Crum & Foster of Canada Ltd.
Herald Insurance Company
Industrial Underwriters, Inc.
Industrial Indemnity Insurance Services
255 California Corporation
Multicomp Employees Association, Inc.
Duncan Services, Inc.
One Stop Insurance Shop, Inc.
Aviation Office of America, Inc.
Aviation Reinsurance Management Incorporated
Aviation Reinsurance Management (London) Limited
Premium Budget Corporation
International Aviation Underwriters, Inc.
American Eagle Insurance Company
American Meridian Insurance Company Limited
Aviation Adjustment Bureau, Inc. (formerly AOA, Inc.)
J.H. Blades & Co., Inc.
J.H. Blades, Inc.
Blades & Co. Services (La.), Inc.
J.H. Blades of Louisiana, Inc.
Blades & Associates Ltd.
J.H. Blades & Co. (Pte.) Ltd.
Fairfax Underwriters Services, Inc.